405

34

25pgs

(11)

No. 05-144

In the

Supreme Court of the United States

JEFFREY H. BECK,
Liquidating Trustee of the Estates of
Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION,
EDWARD J. MILLER, and JEFFREY D. MACEK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

RORY K. LITTLE
HASTINGS COLLEGE OF LAW (U.C.)
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 565-4669

WILBER H. BOIES
MICHAEL T. GRAHAM
McDERMOTT WILL & EMERY LLP
227 West Monroe Street, Suite 4400
Chicago, IL 60606
Telephone: (312) 984-3606

DAVID E. ROGERS
M. MILLER BAKER
Counsel of Record
MICHAEL S. NADEL
JEFFREY W. MIKONI
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

Counsel for Petitioner Jeffrey H. Beck

April 17, 2007

CORPORATE DISCLOSURE STATEMENT

Petitioner incorporates by reference the Corporate Disclosure Statement included in its Petition for Writ of Certiorari filed on May 10, 2006.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iii
ARGUMENT 1
I. Crown's Merger Decision Was a Non-Fiduciary Plan Sponsor Function 1
II. ERISA's Text and Structure Do Not Allow Merger As a Means of Termination 7
A. Merger Cannot Serve As a Means of Termination Under 29 U.S.C. § 1341. 7
B. ERISA's Structure Precludes PACE's Theory of Termination By Merger. 12
III. The PBGC's Consistent Interpretation of Its Regulations Confirms That Merger Is Not a Means of Termination 15
CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Brillinger v. Gen. Elec. Co., 130 F.3d 61 (2d Cir. 1997) 13

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 1

Garcia v. United States, 469 U.S. 70 (1984) 8

Gonzales v. Oregon, 126 S. Ct. 904 (2006) 18

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 1, 11

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 1

Malia v. Gen. Elec. Co., 23 F.3d 828 (3d Cir. 1994) 13

Mead Corp. v. Tilley, 490 U.S. 714 (1989) 3, 12

Ortberg v. Capsonic Group, Inc., No. 90-6535, 1991 U.S. Dist. LEXIS 1833 (N.D. Ill. Feb. 12, 1991) 3

Pegram v. Herdrich, 530 U.S. 211 (2000) 1, 5

United States v. Mead Corp., 533 U.S. 218 (2001) ... 18

Varity Corp. v. Howe, 516 U.S. 489 (1996) 4

STATUTES

26 U.S.C. § 401(a)(11) 19

26 U.S.C. § 402(e)(4) 9

26 U.S.C. § 411(a)(11) 19

26 U.S.C. § 411(d)(3) 3

26 U.S.C. § 417 19

29 U.S.C. § 1002(21)(A) 1, 5

29 U.S.C. § 1058 ..... 12, 13

29 U.S.C. § 1103(c) 14

29 U.S.C. § 1306(a)(3) 15

29 U.S.C. § 1307(a) 15

29 U.S.C. § 1341 ..... passim
29 U.S.C. § 1341(b)(3)(A) 8, 10
29 U.S.C. § 1341(b)(3)(A)(i) ..... passim
29 U.S.C. § 1341(b)(3)(A)(ii) ..... passim
29 U.S.C. § 1344 ..... 10, 11
29 U.S.C. § 1344(d)(1) 14
29 U.S.C. § 1344(d)(3)(A) 3
29 U.S.C. § 1412 12

REGULATIONS

29 C.F.R. § 2617.27(c) (1993) 19
29 C.F.R. § 4041.23(b)(9) 13
29 C.F.R. § 4041.27(c) (1996) 19
29 C.F.R. § 4041.28(c)(1) 9, 18, 19
29 C.F.R. § 4041.6(a) (1996) 19

OTHER AUTHORITIES

18B Wright, Miller & Cooper, Federal Practice and Procedure § 4478 (2d ed. 2002) 6
62 Fed. Reg. 12,508 (Mar. 14, 1997) 19
62 Fed. Reg. 60,424 (Nov. 7, 1997) 19
62 Fed. Reg. 60,427 (Nov. 7, 1997) 19
IV Scott on Trusts § 347.7 (4th ed. 1989) 5
PBGC Op. Ltr. 84-2 11
PBGC Op. Ltr. 85-11 16
PBGC Op. Ltr. 85-21 16
PBGC Op. Ltr. 85-25 16
Restatement (Second) of Trusts § 226 (1959) 4
Restatement (Second) of Trusts § 4 (1959) 4
The American Heritage Dictionary of the English Language (1981) 8
Uniform Trust Code § 816(21)(B) 5

ARGUMENT

I. Crown's Merger Decision Was a Non-Fiduciary Plan Sponsor Function.

A. Under this Court's decisions interpreting ERISA's definition of fiduciary, 29 U.S.C. § 1002(21)(A), decisions concerning "adopt[ing]" or "modify[ing]" a pension plan, *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995), "amending or terminating a plan," *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (internal quotations omitted), "the composition or design of the plan itself," *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999), or "the content of a plan," *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000), are not fiduciary acts. Confronted by this line of decisions, which the Ninth Circuit ignored, PACE concedes that a decision concerning the merger of *ongoing* plans is a non-fiduciary plan sponsor function. Resp. Br. at 13–14 n.5.

PACE argues that in this instance, however, Crown's merger decision was a fiduciary act because the decision occurred in the context of termination discussions. *Id.* at 19-21. PACE notes that § 1002(21)(A) imposes fiduciary duties on the disposition of plan assets, and argues that a merger involves a disposition of plan assets. *Id.* at 14–17. PACE also argues that in the context of termination, merger has no impact on plan structure or benefits, because the benefits provided by the successor plan are equal to those provided in the original plan. *Id.* at 19–20.

B.1. Crown's decision to reject PACE's merger proposal, and to not revisit its termination decision, involved the form and content of its plans at the most basic level: whether to merge the plans into PIUMPF, subjecting plan participants to the terms of PIUMPF.[1] Because

---

[1] Indeed, PACE has previously stressed the change in plan terms that merger with PIUMPF would cause, as part of its assertions that merger would have been beneficial for plan par-

a merger decision determines the terms that will govern plan participants, *see, e.g.*, Pl. Ex. 25, at 00497 (Bankr. Dkt. 22, at 56, 89) (draft merger agreement providing Crown plan would be merged into PIUMPF "on the basis, terms, and conditions herein"), it is a non-fiduciary function as much as a decision to create, amend, modify, or terminate a plan. Precisely because a merger decision is a plan sponsor function, PACE's draft merger agreement provided that Crown would execute the agreement in its plan *sponsor* capacity. *See id.* (agreement would be signed by Crown "*on behalf of certain pension plans that it sponsors*") (emphasis added).[2]

2. Not only does a merger decision in the context of termination implicate plan terms, it also directly affects the form in which the plan provides benefits. In a standard termination, plan assets are distributed to participants in the form of annuity contracts or lump sum payments. By reversing a termination decision and instead opting to merge, a plan sponsor would be choosing to maintain the plan's benefits through the acquiring plan.

3. PACE argues that the benefits available through its merger proposal would have been identical to the benefits provided in Crown's plan, so there would have been no change in benefits resulting from a merger.

---

ticipants. *See, e.g.*, Pet. App. 5, 32, 57 (discussing PIUMPF's unique dispute resolution terms).

[2] PACE's transmittal letter forwarding the draft merger proposal further underscores that PACE contemplated that its merger proposal was made to Crown in the latter's plan sponsor capacity: "Attached is a draft Merger Agreement to reflect the proposed merger between certain plans *sponsored by Crown Vantage* and the PACE Industry Union-Management Pension Fund ('PACE Fund'). This is a rough draft of the proposed Merger Agreement, *but we wanted to provide you with a document that reflects our understanding of how the transaction will be structured.*" Pl. Ex. 25, at 00495 (Bankr. Dkt. 22, at 56, 89) (emphasis added).

Resp. Br. at 19–20. Yet PACE's arguments below relied on several effects merger into PIUMPF would have on participant benefits, including the potential that participants could receive increased benefits or benefits in a different form. *See* Pet. App. at 5, 32, 57 (discussing "thirteenth monthly check"); *see also* Tr. of Proceedings, Nov. 29, 2001 (Bankr. Dkt. 22), at 61–65 (discussing plan differences). In any event, as PACE's draft merger agreement recognized, the level of benefits provided by merger would have depended upon the terms agreed to by Crown and PACE. *See* Pl. Ex. 25, at 00497 (Bankr. Dkt. 22, at 56, 89). Negotiation of those terms was a non-fiduciary function performed by the respective plan sponsors, Crown and PACE.

4. Crown's choice between standard termination and merger singularly determined the level of benefits participants received. "When an employer voluntarily terminates a single-employer defined benefit plan, all accrued benefits automatically vest, notwithstanding the plan's particular vesting provisions." *Mead Corp. v. Tilley*, 490 U.S. 714, 717 (1989) (citing 26 U.S.C. § 411(d)(3)). ERISA, however, does not similarly require automatic vesting upon the consummation of a merger. *See Ortberg v. Capsonic Group, Inc.*, No. 90-6535, 1991 U.S. Dist. LEXIS 1833, at *6–13 (N.D. Ill. Feb. 12, 1991) (merger of pension plan was not termination; participant did not enjoy automatic vesting of accrued benefits in merger). Merger also would not have provided plan participants with the extra assets attributable to their individual contributions, even though participants had a right to such assets in termination. *See* 29 U.S.C. § 1344(d)(3)(A); *see also* Pet'r Br. at 33–34. Thus, while PACE's draft merger agreement provided the same level of benefits that participants enjoyed *prior* to termination, PACE's

proposal did not provide for the additional benefits that plan members enjoyed by *virtue* of termination.[3]

C. PACE argues that under the common law of trusts, the disposition of trust assets is a trustee function. *See* Resp. Br. at 14–15. At common law, however, a trustee lacks the power to make decisions concerning trust terms, as such decisions are settlor functions. *See* Restatement (Second) of Trusts § 4, at 13 (1959) ("Restatement") ("The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust expressed in a manner which admits of its proof in judicial proceedings."); *see also Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) ("[I]t may be true that amending or terminating a plan (or a common law trust) is beyond the power of a plan administrator (or trustee)—and, therefore, cannot be an act of plan 'management' or 'administration.'"). A trustee therefore lacks the power to *choose* to transfer assets to another trust through merger; such a transfer must either be authorized by the trust's beneficiary or ordered by a court. *See* Restatement § 226, at 523 (trustee is liable "if he pays or conveys to a person who is neither the beneficiary nor one to whom the beneficiary or the court has authorized him to make such payment or conveyance").[4] Hence, a decision *whether* to merge, like

---

[3] PACE's merger proposal provided that "[a]ccrued benefits of the former participants of the Crown Vantage Plans will be paid and administered by the PACE Fund in accordance with the applicable Crown Vantage Plan." Pl. Ex. 25, at Ex. G (Bankr. Dkt. 22, at 56, 89). Thus, accrued benefits that had not vested by the time of merger with PIUMPF would have remained forfeitable after a merger.

[4] PACE argues that it is a "common practice" for trustees to distribute trust assets to another trust, rather than directly to the beneficiary. Resp. Br. at 34 & n.12. The authorities cited by PACE actually stand for different propositions, namely, that a trustee may distribute assets to another trust when the beneficiary is a minor or suffers some other legal disability, or

any other decision concerning plan terms, is not a disposition of plan assets within the meaning of 29 U.S.C. § 1002(21)(A) or the common law, any more than a decision whether to terminate is a disposition of assets.

D. PACE argues that "the plan document allowed the plan administrator to implement the sponsor's termination decision through a merger." Resp. Br. at 16; *see also id.* at 21. To the extent that PACE argues that the Crown plan document made Crown's merger decision a fiduciary function, PACE is wrong both in law and fact.

Under ERISA, the mere fact that a plan assigns to the plan administrator a decision that by its nature is a settler function does not transform that decision into a fiduciary act. Whether a given function is a fiduciary act under ERISA turns not on what *person* performs the function, however that person may be denominated under the plan document, but on the nature of the function itself; ERISA "does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only *'to the extent'* that he acts in such a capacity in relation to a plan." *Pegram*, 530 U.S. at 225–6 (emphasis added). Were a plan document's denomination of a person as plan administrator or plan sponsor determinative of the fiduciary status of functions performed by such person, ERISA's fiduciary duties could be avoided

---

that a trust can distribute to another trust when the second trust is a beneficiary of the first. *See* Uniform Trust Code § 816(21)(B) (trustee to trustee distribution permissible when beneficiary is minor or is incapacitated); IV Scott on Trusts § 347.7, at 579–80 (4th ed. 1989) (recognizing trust-to-trust distribution when the latter is a beneficiary of the former). Absent legal disability on the part of a beneficiary or the designation of another trust as a beneficiary, there is no authority at common law for a trustee to make a trust-to-trust distribution of trust assets.

altogether by the simple expedient of denominating fiduciary functions as plan sponsor decisions—surely an inconceivable result.

PACE is also wrong as a matter of fact. The plan document's discussion of merger is not in the context of termination, and is silent as to whether merger is a plan sponsor or plan administrator function. *See* J.A. 81, at ¶12.5 (D. Dkt. 14, at Tab 6). Although the district court held that "the plan terms do not bar a merger with PIUMPF," Pet. App. 47, the court did not state that the plan assigns the *decision* of whether to merge to the plan administrator, or that the decision should be made in a fiduciary capacity. *See ibid.*[5]

E. As Crown noted in its opening brief, the Ninth Circuit essentially employed a temporal test to determine whether a merger decision is a fiduciary function. Under the Ninth Circuit's test, a merger decision made before a termination decision is a non-fiduciary plan sponsor function, but a merger decision made after a termination decision is deemed fiduciary. *See* Pet'r Br. at 18–19. PACE's "contextual" test is also temporal, because PACE concedes that merger between ongoing plans is a plan sponsor function. *See* Resp. Br. at 13–14 n.5. Yet ERISA's fiduciary provisions do not distinguish between merger of

---

[5] PACE contends that the district court's construction of the plan document is binding in this Court. That cannot be, as the Ninth Circuit held that it would not review that construction because Crown did not properly present the issue to the bankruptcy court in the first instance. Pet. App. 10. As the Ninth Circuit thereby implicitly vacated the district court's construction of the plan document, the district court's construction is not law of the case. *See* 18B Wright, Miller & Cooper, Federal Practice and Procedure § 4478, at 655 (2d ed. 2002) (implicitly vacated district court determination "ceases to be the law of the case"). In any event, to the extent that construction of the plan document is necessary to resolve the question presented, it is fairly included therein.

a plan considered for termination and merger of an ongoing plan. In both cases, the plan's separate existence ends, not through ERISA standard termination procedure, but rather through assumption into the acquiring plan. In both cases, the assets of one plan are transferred to the other, rather than to plan participants. And in both cases, the terms of the successor plan, and the form and level of benefits provided therein, depend upon the agreement negotiated between the plan sponsors of the original plans. Consequently, a merger decision is a non-fiduciary sponsor function whenever it is made.

II. ERISA's Text and Structure Do Not Allow Merger As a Means of Termination.

A. Merger Cannot Serve As a Means of Termination Under 29 U.S.C. § 1341.

As Crown has explained, merger cannot serve as a means of implementing the standard termination of a pension plan because it does not satisfy the plain textual requirements set forth in 29 U.S.C. § 1341(b)(3)(A)(ii)—distribution to plan participants that fully provides all benefits. Pet'r Br. at 21–28; *see also* Gov't Br. at 18–20. PACE claims in response that because § 1341(b)(3)(A)(i) provides express authorization for annuitization as a means of distributing plan assets, § 1341(b)(3)(A)(ii) should be read to authorize plan termination through the "legal equivalent" of annuitization. Resp. Br. at 22–27.

1. PACE derives its equivalency test from a single word in § 1341(b)(3)(A)(ii): "otherwise." PACE argues that "[b]ecause Congress plainly intended [annuitization] to be a method to 'fully provide all benefit liabilities,' and because Congress expressly permitted methods that 'otherwise' accomplish that objective," it follows that the legal equivalents of annuitization satisfy subsection (ii). Resp. Br. at 23–24. PACE's argument is premised on a connective reading of "otherwise"—*i.e.*, an assumption that the term means that the annuitization process set

forth in subsection (i) is an example of a method of fully providing benefit liabilities under subsection (ii).

Contrary to PACE's argument, "otherwise" is used in § 1341(b)(3)(A)(ii) as a term of *disjunction*, separating annuitization, one method of distributing assets during a termination, from a second, distinct method: the immediate, complete payment of plan benefits.[6] A disjunctive reading of "otherwise" is reinforced by Congress's use of the disjunctive "or" separating subsections (i) and (ii). "Canons of construction indicate that terms connected in the disjunctive . . . be given separate meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984). Congress's use of "or" to differentiate between § 1341(b)(3)(A)'s two distribution methods, coupled with its use of the word "otherwise" in subsection (ii), leads to the inference that the two methods are different, rather than overlapping.

The substantive wording of subsections (i) and (ii) confirms that the two methods of distribution are entirely distinct. Subsection (i) requires plan administrators to purchase irrevocable commitments "to provide" benefit liabilities—*i.e.*, an irrevocable obligation from an insurer to pay benefits *over time*. By contrast, compliance with subsection (ii) requires that the administrator "fully provide all benefit liabilities under the plan" to the participants—*i.e.*, a lump sum payment of *all* outstanding liabilities. Subsection (i)'s provision requirement is phrased as an infinitive, authorizing purchase of a specifically-identified future commitment to pay; subsection (ii)'s provision requirement is in the present tense, and therefore can only be satisfied by immediate payment of *full* benefit liabilities. This grammatical difference establishes that speculative "benefit promises," such as those offered by PACE's proposed merger, cannot satisfy the present tense

---

[6] "Otherwise" means "[i]n another way; differently." The American Heritage Dictionary of the English Language 931 (1981).

payment requirement of subsection (ii), notwithstanding the fact that annuitization satisfies subsection (i).

PACE argues that if Congress meant to limit the scope of subsection (ii) to "lump sum" distributions, it could have used that precise phrase, as it did in 26 U.S.C. § 402(e)(4). Resp. Br. at 32 & n.9. Although the text of § 1341(b)(3)(A)(ii) theoretically permits other distribution methods so long as such methods comply with its requirements, those requirements are only satisfied by immediate payment of full benefit liabilites. The only known distribution method that satisfies these requirements is a lump sum distribution, either in the form of payment to participants or rollovers to participants' individual retirement accounts. If any other distribution method satisfies § 1341(b)(3)(A)(ii), neither the government nor PACE has identified such a method.[7]

In sum, § 1341 mandates that in a standard termination plan assets must be distributed through one of two *independent* methods. Under subsection (i), termination can be achieved through the purchase of an irrevocable commitment to provide plan participants with their benefits over time. Otherwise, under subsection (ii), the administrator must fully provide benefit liabilities to plan participants—an option that has only been satisfied through immediate, complete, lump sum cash payment to the plan participants. Section 1341(b)(3)(A) treats these two options differently, and PACE makes no effort to

---

[7] To the extent that the PBGC's regulation appears to recognize forms of distribution other than the purchase of annuities and lump sum payments, *see* 29 C.F.R. § 4041.28(c)(1) (requiring plan administrator to distribute assets in a standard termination by the purchase of annuities or "in another permitted form"), the other "permitted form" is the transfer of assets to the PBGC in the case of missing participants, as authorized by the second sentence of § 1341(b)(3)(A)(ii).

assert that merger is legally equivalent to direct payment under subsection (ii), nor could it. But PACE cannot excuse merger's failure to satisfy the requirements of subsection (ii) by attempting to analogize merger to the annuitization authorized in subsection (i), because § 1341(b)(3)(A) does not equate annuitization under subsection (i) with the distinct procedure authorized in subsection (ii). PACE's proposed "legal equivalent" standard therefore cannot be correct. As merger does not satisfy the actual textual requirements set forth in § 1341(b)(3)(A)(ii), it is not a method of effecting a standard termination under that section, despite any alleged similarity between merger and annuitization.

2. Even if PACE's legal equivalency test were correct, merger still would not satisfy § 1341, because merger into a multiemployer plan is *not* the legal equivalent of the purchase of irrevocable annuity commitments. The "promise to pay" provided by merger is fundamentally different from annuitization, which provides plan participants with an irrevocable commitment from an insurance company to provide benefits *independent* of the ERISA regime.[8] Equating merger with annuitization disregards a central point of plan termination—the end of ERISA responsibility for participants' benefits.

Merger similarly does not satisfy § 1341(b)(3)(A)'s requirement that in a termination plan assets be distributed in accordance with 29 U.S.C. § 1344, which requires a plan administrator to actually allocate the plan assets among its participants and beneficiaries. Pet'r Br. at 22–23. PACE claims that because a standard termination is only permissible when sufficient assets exist to cover all

---

[8] Any insurance company selected to provide annuities is closely evaluated based on regulatory criteria, including state licensing, the quality of the insurer's portfolio, and the availability of additional protection through state guaranty associations. *See* 29 C.F.R. § 2509.95-1(b), (c).

of the priority categories listed in § 1344, no allocation actually occurs in a standard termination, and therefore a multiemployer plan's general promise to satisfy all of the priority categories in the future complies with § 1344. Resp. Br. at 35. Such a claim disregards the fact that annuitization, unlike merger, actually divides plan assets among the plan participants, who receive their allocation in the form of an individual, contractually enforceable right to their share of an annuity. *See* Gov't Br. at 20 (discussing individual allocation rule). In merger, on the other hand, no such allocation occurs. The original plan's assets are instead commingled into the multiemployer plan's general asset pool, of which the individual plan participants have no right to a specific share. *See Hughes Aircraft*, 525 U.S. at 440.[9] As part of this pool, the original plan's assets would be made available to satisfy the benefits of *other* participants in the multiemployer plan, rather than being singularly allocated to the Crown participants.

Merger arguably promises that participants in the § 1344 categories will receive payments at some future point; annuitization actually *allocates* the funds, as required by § 1344. Merger and annuitization are therefore not legally equivalent for the purposes of termination.

3. This conclusion fully conforms with § 1341's legislative history, despite PACE's claims to the contrary. PACE relies heavily on a version of § 1341(b)(3)(A)(ii)

---

[9] PACE asserts that Crown and the government's prior arguments on this issue rely on an IRS regulation inapplicable to multiemployer plans. *See* Resp. Br. at 33 n.10. Although the regulation applies by its terms only to single-employer plans, the PBGC has made clear that the same analysis applies to multiemployer plans. See PBGC Op. Ltr. 84-2 (Jan. 17, 1984). Moreover, the requirement that all of the plan assets must be available to pay benefits to all of the plan participants and beneficiaries is inherent in the nature of a defined benefit plan.

that was originally proposed to Congress, which required the plan administrator, in non-annuitization terminations, to satisfy "the obligation to provide when due" all benefits under the plan. Resp. Br. at 30. According to PACE, even though this language was not adopted, it establishes that subsection (ii) permits payment over time because Congress subsequently enacted "a less restrictive rule." *Id.* at 30–31. PACE errs by relying upon language *rejected* by Congress—material that is irrelevant to interpretation of the language Congress actually enacted into law. *See, e.g., Tilley*, 490 U.S. at 723 ("We do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent.").[10]

B. ERISA's Structure Precludes PACE's Theory of Termination By Merger.

ERISA's structure confirms that merger and termination are separate and distinct processes. The Ninth Circuit disregarded these structural differences, relying instead upon the placement of § 1341 (governing terminations) and 29 U.S.C. § 1412 (governing mergers) within Title IV of ERISA. *See* Pet'r Br. at 28–31. Tellingly, PACE makes no effort to defend this error. Instead, PACE attempts to minimize the structural conflicts created by its overly-expansive interpretation of § 1341.

1. As Crown has noted, 29 U.S.C. § 1058 expressly distinguishes between merger and termination, treating

---

[10] Even if unenacted language *were* relevant, the difference between the proposed and adopted versions supports Crown's interpretation of § 1341. The language actually adopted by Congress is *narrower* than the unenacted language invoked by PACE. As adopted, subsection (ii) replaced the proposed "provide when due" language with a stricter obligation to "fully provide all benefit liabilities." 29 U.S.C. § 1341(b)(3)(A).

them as separate processes. The natural import of this section, as courts of appeals interpreting it have noted, is that the validity of a merger is judged by reference to terminations hypothetically conducted before and after the merger—a process that would be tautological if PACE's interpretation of § 1341 were correct. Pet'r Br. at 32; *see also Brillinger v. Gen. Elec. Co.*, 130 F.3d 61, 62 (2d Cir. 1997); *Malia v. Gen. Elec. Co.*, 23 F.3d 828, 831–32 (3d Cir. 1994) (contrasting "hypothetical termination" in merger with "actual termination").

In response, PACE notes that § 1058 "refer[s] to a common basis of calculating the extent of funding for benefit liabilities," Resp. Br. at 36 n.14, a statement that does not change the fact that this "common basis" conditions the validity of merger on an express comparison of two *separate* processes: merger and termination. PACE's claim that the provision, even if meaningless in cases of termination-by-merger, would still have value in other merger cases, *see ibid.*, further strains credibility—the more plausible reading is that merger is not, and cannot be, a method of implementing a standard termination.

2. PACE seeks to minimize the different notice requirements ERISA's implementing regulations impose on mergers and terminations by claiming that in some cases it would be possible for both notices to issue. *See ibid.* Such a claim disregards *substantive* differences between the separate notices. In termination, plan participants must be notified in advance that after termination "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. § 4041.23(b)(9). After merger, however, the PBGC in fact *continues* to guarantee a participant's benefits. *See* Pet'r Br. at 32–33; Gov't Br. at 22. The PBGC must receive advance notice of termination proposals in order to ensure compliance with regulatory requirements, yet ERISA's merger provisions do not provide for advance notice to either the PBGC or plan participants. *Ibid.* PACE claims that the

two systems can be reconciled, *see* Resp. Br. at 36–37, but the mere fact that ERISA *creates* these two independent systems, without any indication that they could apply simultaneously, implicitly establishes that merger and termination are in fact separate and unrelated processes.

3. PACE tries to explain away the fact that reversions to employers are available in termination but not in merger, *see* Pet'r Br. at 33–35 (citing 29 U.S.C. §§ 1344(d)(1) and 1103(c)), by claiming that PACE's proposal could have been restructured as a "transfer of assets and liabilities," rather than a complete merger of the Crown plans into PIUMPF.[11] However, such transfers still do not provide for a reversion to an employer. At most, they permit employers to restructure pension plans such that a reversion could be available in a subsequent termination. *See* Part III.A, *infra*. The merger or transfer is not *itself* a method of terminating a plan, nor does it in fact provide a reversion. Moreover, PACE simply fails to address the fact that in a termination, participants that made individual contributions to a plan

---

[11] To the degree the distinction between "merger" and "transfer" is material for purposes of resolution of the question presented, the time for PACE to have raised this distinction has long passed. *See* S. Ct. R. 15.2. PACE's eleventh-hour assertion that its proposal constituted a mere transfer to PIUMPF, rather than complete merger of the Crown hourly plans into PIUMPF, is contradicted by PACE's contemporaneous characterization of its proposal to Crown as a "merger" proposal, *see* note 2, *supra*, and its repeated use of the term "merger" to describe its proposal in its Brief in Opposition. *See, e.g.*, Counterstatement of Questions Presented, Br. in Opp. at i ("Whether *merger* into a multiemployer pension plan is a method of providing benefit liabilities in terminating a single-employer plan under ERISA.") (emphasis added). Nowhere in its Brief in Opposition did PACE take issue with the characterization, in Crown's petition, of PACE's proposal as a "merger" proposal.

have an individual claim to reversion of excess assets attributable to their contributions. *See* Pet'r Br. at 33–34.

4. PACE also ignores other indicia that ERISA treats merger and termination as distinct concepts. As discussed in Petitioner's Brief at 24–25, distribution of plan assets during termination ends the payment of premiums to the PBGC, *see* 29 U.S.C. § 1307(a), and ends the PGBC's guarantee of benefits so distributed. That is simply not the case with the merger. In merger, insurance premiums continue to be paid to the PBGC, *see* 29 U.S.C. § 1306(a)(3), reflecting the PBGC's continued insurance responsibility for the transferred benefit liabilities. These conflicting requirements for termination and merger cannot be reconciled.

III. The PBGC's Consistent Interpretation of Its Regulations Confirms That Merger Is Not a Means of Termination.

In order to avoid ERISA's textual and structural rejection of its position, PACE claims that the interpretation advanced by Crown and the government contradicts the PBGC's prior practices, and asserts that the government's views are not entitled to deference in this case. Both contentions are flawed: the PBGC's prior practices are wholly consistent with ERISA's rejection of PACE's arguments, and the agency's views are properly entitled to deference.

A. Throughout its brief, PACE relies on PBGC opinion letters that it claims characterize and approve of the transfer of assets to a multiemployer plan as a "permissible method of distributing assets upon plan termination." *See, e.g.*, Resp. Br. at 38–42. PACE misreads the PBGC's prior letters, which in fact reaffirm that merger and termination are separate procedures.

Though the PBGC letters evidence concerns arising when plan modification and termination are conducted in

rapid succession, they in no way suggest that merger constitutes a method of *distributing* assets in satisfaction of 29 U.S.C. § 1341's standard termination requirements. Nor do they suggest that decisions regarding plan modification are governed by fiduciary duty. Rather, the letters consistently characterize the transactions as involving two separate sponsor-level decisions: a decision to modify plan structure by merger, spinoff, or transfer, followed by a decision to terminate a remaining plan.

PBGC Opinion Letter 85-25, which PACE claims is "the one occasion in which the PBGC considered the issue raised in this case," Resp. Br. at 39, actually provides the clearest *rejection* of PACE's argument. In that circumstance, after an employer proposed the termination of its single-employer plan, its union conditioned acceptance of the termination proposal upon the company's willingness to transfer assets and liabilities to a multiemployer pension plan to which the union was a party. Br. in Opp. at 14a. The PBGC described the resulting transaction as "a transfer from a single-employer plan to an ongoing multiemployer plan *followed by* the termination of the single employer plan." *Ibid.* (emphasis added). The textual separation is clear: *first* assets and liabilities would be transferred to the multiemployer plan, and *then* the extant single-employer plan would be terminated through "the plan termination requirements of Title IV of ERISA." *Ibid.* Other opinion letters relied on by PACE evidence the same two-step understanding. *See* PBGC Op. Ltr. 85-11 (Br. in Opp. at 6a–9a) (plan split-up followed by plan termination); PBGC Op. Ltr. 85-21 (Br. in Opp. at 10a–13a) (same). Based on that understanding, the PBGC approved of the two-step transaction.

The PBGC letters acknowledge that in some cases, two step "spin-off/termination" transactions are actually improper attempts to capture a reversion from an ongoing plan without fully complying with ERISA's requirements. In such cases, the termination component of the two-step

transaction is rejected by the PBGC unless the employer purchases annuity contracts securing the benefit liabilities of the *original* plan, rather than just the subpart being terminated—a distinct obligation from § 1341's requirement that the benefit liabilities remaining in the *terminated* plan be distributed to the plan participants. *See* Joint Implementation Guidelines (Br. in Opp. at 3a). The specific letters PACE relies on considered application of this rule to proposed two-part transactions and found that the additional guidelines "[did] not apply." *See, e.g.*, Br. in Opp. at 15a. As the guidelines did not apply, the employer had no obligation to annuitize the entire original plan; it was permitted with the standard termination of the extant portion.

The PBGC letters contain no suggestion that a pre-termination merger/transfer is considered a method of *implementing* the subsequent termination—the distribution of assets pursuant to 29 U.S.C. § 1341(b)(3)(A)(ii). Instead, they establish that such transfers constituted a permissible *restructuring* of the plan, in which benefit liabilities were conveyed into a separate plan *prior* to a standard termination conducted in accordance with Title IV. Such structural decisions, like all other decisions regarding plan amendment or modification, are non-fiduciary plan sponsor functions.

Crown does not dispute that ERISA permitted it to merge its pension plans. Indeed, rather than terminate its individual hourly plans, Crown in fact merged twelve of its pension plans together and then terminated this successor plan pursuant to § 1341(b)(3)(A)(i). Pet'r Br. at 4–5. What Crown does dispute, and what the PBGC letters do not support, is PACE's claim that its merger proposal constituted a *method of implementing* the standard termination of Crown's plans, such that Crown would have had a fiduciary obligation to consider PACE's proposal. The PBGC's position, as expressed in the government's brief and corroborated by its opinion letters and

interpretive regulations, is that merger and termination are independent processes. Therefore, if Crown had accepted PACE's proposal, Crown would have chosen merger *instead* of termination, rather than merger as a means of termination.

B. Crown's argument is further supported by the PBGC's interpretation of 29 C.F.R. § 4041.28(c)(1), which provides that termination can only be effected through annuitization or lump sum payment. *See* Gov't Br. at 21–23. Relying on *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), PACE argues that the PBGC's interpretation of its regulation is not entitled to deference. Resp. Br. at 47–50. However, *Gonzales* has no application here. In *Gonzales*, the Court declined to give deference to the Attorney General's interpretation of a regulation that "parrot[ed]" the words of the statute, explaining that "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." 126 S. Ct. at 916.

In this case, in contrast, the relevant question *is* the meaning of the regulation. ERISA clearly requires any alternative method of distributing assets in a termination to be permitted by the PBGC's regulations. *See* 29 U.S.C. § 1341(b)(3)(A)(ii) (alternative method of distribution must be "in accordance with . . . applicable regulations"). Because the critical question is thus the meaning of the PBGC's regulations themselves, deference is appropriate. If the Court had deferred to the executive's informal interpretation in *Gonzales*, it would have permitted the government to evade the limitations that the Court has placed on the executive's interpretation of *statutes*. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (deference to government's interpretation of statute generally appropriate only where interpretation is embodied in formal rulemaking or adjudication). Here, there is no such danger, because the government is invoking def-

erence in order to clarify the meaning of an ambiguity in the PBGC's *regulations*, not an ambiguity in ERISA.

These regulations, as the government has explained, establish that merger is not a valid method of implementing a standard termination. Gov't Br. at 21–23. Indeed, the PBGC has consistently prescribed methods of distribution that would foreclose merger. *See, e.g.*, 29 C.F.R. § 2617.27(c) (1993); 29 C.F.R. §§ 4041.6(a), 4041.27(c) (1996). PACE attempts to undermine the PBGC's arguments by claiming that the PBGC's 1997 amendments to its regulations, which adopted the language currently found at 29 C.F.R. § 4041.28(c)(1), "affirmatively broadened" the provision in a manner inconsistent with the agency's current position. Resp. Br. at 42–43. However, there is no hint in the preamble to either the proposed or final 1997 rule that the regulations were changing the permissible *methods* of distribution. *See* 62 Fed. Reg. 12,508 (Mar. 14, 1997); 62 Fed. Reg. 60,424 (Nov. 7, 1997).

Moreover, the limitations on distribution methods contained in the pre-1997 rule were carried forward in the Form 500 instructions, which were expressly designed to "implement[ ]" the final rule. *See* 62 Fed. Reg. at 60,427 (Nov. 7, 1997); *see also* Chamber Br. at 11–12. These limitations are required by the Internal Revenue Code, which mandates that ERISA plans provide benefits in the form of a joint and survivor annuity unless the participant and his or her spouse elect another form, and allows non-consensual lump sum distributions only when benefits are de minimis. 26 U.S.C. §§ 401(a)(11), 411(a)(11), 417. The PBGC's interpretation therefore accords with its regulations, as neither the pre- nor post-amendment versions of 29 C.F.R. § 4041.28(c)(1) endorse PACE's claim that merger can serve as a method of distributing assets during a standard termination.

CONCLUSION

For the reasons provided above and in ~~Crown~~'s opening brief, this Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

RORY K. LITTLE
HASTINGS COLLEGE OF LAW (U.C.)
200 McAllister Street
San Francisco, CA 94102
Telephone: (415) 565-4669

WILBER H. BOIES
MICHAEL T. GRAHAM
MCDERMOTT WILL & EMERY LLP
227 West Monroe Street, Suite 4400
Chicago, IL 60606
Telephone: (312) 984-3606

DAVID E. ROGERS
M. MILLER BAKER
Counsel of Record
MICHAEL S. NADEL
JEFFREY W. MIKONI
MCDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 756-8000
Facsimile: (202) 756-8087

Counsel for Petitioner Jeffrey H. Beck

April 17, 2007